Supreme Court, U.S.
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No. 89-1131 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

CHRISTINA FANG-HUI LIAO, PETITIONER

v.

CHARLES H. DEAN, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902-1499

JAMES E. FOX
Deputy General Counsel

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

THOMAS F. FINE
Senior Litigation Attorney

JOHN P. KERNODLE
Attorney
Tennessee Valley Authority
Knoxville, Tennessee 37902-1499

QUESTIONS PRESENTED

1. Whether an employer commits a per se violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by dismissing, pursuant to a valid reduction-in-force, a person who was hired under a voluntarily adopted affirmative action plan, instead of dismissing a similarly qualified person who was not covered by the plan.

2. Whether the court of appeals properly entered judgment for respondents after finding that petitioner had presented no evidence of discrimination.

LIST OF PARTIES

The parties to this case in the court of appeals were:

Christina Lang-Hui Liao, Plaintiff-Appellee

Charles H. Dean, Jr., Defendant-Appellant

John B. Waters, Defendant-Appellant *

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* Petitioner fails to list Mr. Waters and incorrectly lists the Tennessee Valley Authority (TVA) as a party in the court of appeals. The TVA is a wholly owned federal corporation, and the sole judicial remedy for claims of race and sex discrimination by its employees is a suit pursuant to 42 U.S.C. 2000e-16(c). *Brown* v. *GSA*, 425 U.S. 820, 832 (1976). One of the statutory conditions is that suit must be brought only against the "head" of the agency, which in TVA's case is its statutory three-member Board of Directors. *Bates* v. *TVA*, 851 F.2d 1366, 1368 (11th Cir. 1988), cert. denied, 109 S. Ct. 3157 (1989). Although TVA was originally a defendant in this litigation, all of the claims against it were dismissed in the district court before trial, and petitioner did not appeal from that dismissal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A28) is reported at 867 F.2d 1366.[1] The opinion of the district court (Pet. App. A1-A14) is reported at 658 F. Supp. 1554. A later opinion of the district court (Pet. App. A15-A18) is unreported. The May 6, 1987, order entered by the district court, from which respondents appealed, is not set out in the

[1] As noted below, the court of appeals' opinion is misprinted in the petition appendix.

appendix to the petition, but is reproduced in the appendix to this brief.

JURISDICTION

The judgment of the court of appeals (Pet. App. A19-A20) was entered on March 16, 1989. A petition for rehearing was denied on September 29, 1989. On December 22, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including January 11, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1982).

STATEMENT

Petitioner, an Asian-American female, brought this action under 42 U.S.C. 2000e-16 to recover for alleged sex and race discrimination arising from the termination of her employment with the Tennessee Valley Authority (TVA) through a statutory reduction-in-force (RIF).

1. Petitioner was hired by TVA in July 1977, as a research chemist with the Soil and Fertilizer Research Branch, Division of Agricultural Development (Agricultural Development), at TVA's National Fertilizer Development Center in Muscle Shoals, Alabama. Agricultural Development had the responsibility for major areas of TVA's fertilizer research and development program. Pet. App. A1; Tr. 94-95; A.R. 625.[2]

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[2] A.R. refers to the two-volume administrative record, which was entered as joint exhibits A and B at the trial. Tr. 6. It contains the record of the TVA Equal Employment Opportunity (EEO) investigation, the transcript of the predecisional evidentiary hearing (held before an Equal Employment Opportunity Commission (EEOC) complaints examiner), the record of petitioner's subsequent appeal to the

The mission of petitioner's branch within Agricultural Development was to test new fertilizer materials and to develop methods of improving the efficiency of plant nutrients. Tr. 150.

Agricultural Development had an Affirmative Action Plan (AAP or plan). Pet. App. A22; A.R. 780-797. The plan demonstrates an emphasis and concern with the recruitment of minorities, but the plan does not refer to RIFs, or to the application of the plan in the case of a RIF. Pet. App. A23; A.R. 780-797.

In 1980 and 1981, Agricultural Development was faced with the most recent in a series of severe budget cuts. Tr. 96-98, 246-248; A.R. 137, 493-495, 527, 553, 626, 632-633. In all, the division lost approximately 40 positions out of 176. Plaintiff's position was one of those lost.[3]

Merit Systems Protection Board (MSPB), including the transcript of the MSPB hearing, and the various administrative decisions by TVA, MSPB, and EEOC rejecting petitioner's claims.

[3] The reasons for undertaking RIFs, and the order in which employees are released or retained in a RIF by the TVA, are mandated by statute and regulations of the Office of Personnel Management (OPM), 5 U.S.C. 3501, 3502; 5 C.F.R. Pt. 351 (1981). See generally *Dodd* v. *TVA*, 770 F.2d 1038 (Fed. Cir. 1985). The TVA is bound by the OPM regulations, which the MSPB applies in its adjudications, see, *e.g.*, *Richardson* v. *TVA*, 12 M.S.P.B. 319 (1982); A.R. 13-14; C.A. R.E. 59-60, and the TVA lacks power to vary them. Both the district court, Pet. App. A5-A6, and petitioner, Pet. 9, rely on an OPM document, A.R. 835, that urges federal agencies to consider the negative effect that RIFs may have on affirmative action efforts. That report states, however, that "[o]f course, agencies are not excused from RIF laws and regulations when they make such considerations." Pet. App. A6 (quoting document). Here, the TVA, the EEOC, and the MSPB all found

John Shields, the division director, instructed his branch chiefs to identify positions that could be eliminated to meet the constraints of the budget. He instructed his subordinates to try to preserve high-priority activities, and, if possible, not to cut an entire area of research. A.R. 627-629.[4] Dr. Sample twice appealed unsuccessfully to Mr. Shields to exempt his branch from the cuts. Tr. 98-103; A.R. 172, 537, 553, 629-630. Left with no choice, Dr. Sample reviewed the research areas currently active within his branch and determined that only the nitrogen area could afford a cut in the number of researchers. He chose the nitrogen area because, of all of the areas within the branch, only it had more than one project leader; to dismiss individuals in another area would have been to eliminate that entire area, contrary to Shields's instructions. Tr. 213-216; A.R. 559-560, 685-687.

The nitrogen area had three separate project leaders, none of whose positions were interchangeable for RIF purposes: Dr. Roland Hauck, Dr. Bert Bock, and petitioner. Dr. Hauk was recognized worldwide as an authority in nitrogen research. Dr. Bock's TVA and pre-TVA work involved practical applications of research results to agriculture, an area of particular importance to top TVA management. Dr. Sample felt that to cut petitioner's position would cause the

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that the TVA had properly applied the RIF laws and regulations notwithstanding the TVA plan, as OPM has required.

[4] The court of appeals' decision notes this instruction, 867 F.2d at 1368, but in reproducing the decision in her appendix (at A23), petitioner omits the word "not" from the court of appeals' decision. The correct portion of the statement reads: "Dr. Eugene Sample, Chief of the Soil and Fertilizer Research Branch, was told that in making cuts, he was *not* to eliminate an entire area of research" (emphasis added).

least damage to the nitrogen research efforts, because, although she was skilled in laboratory work, she did not have the others' breadth or depth of knowledge. Tr. 213-217; A.R. 162-163, 559-562, 651-652, 667-668, 685-687. Formal RIF procedures were implemented, and petitioner was dismissed effective January 8, 1982. Tr. 256-257, 269-271; A.R. 597, 602, 604.

2. Petitioner then invoked her remedies under federal law. See 42 U.S.C. 2000e-16(b) and (c) (1982); 29 C.F.R. Pt. 1613 (1981). She filed an administrative complaint alleging that she was the victim of discrimination on the basis of her race and sex in connection with the RIF. After a thorough investigation and a full evidentiary hearing before a complaints examiner from the Equal Employment Opportunity Commission (EEOC), A.R. 72-583, the TVA adopted, as the agency's final decision, A.R. 594-595, the complaints examiner's recommended decision finding no unlawful discrimination against petitioner, A.R. 585-592.

Petitioner appealed to MSPB, see 5 C.F.R. 351.901 (1981); 29 C.F.R. Pt. 1613, Subpt. D (1981), where she was given another hearing. A.R. 24-864. The MSPB Presiding Official noted that the parties had stipulated that petitioner had established a prima facie case, and that the TVA had articulated a legitimate, nondiscriminatory reason for the RIF action. A.R. 615. The Presiding Official found that the TVA had followed proper RIF procedures and that petitioner had failed to establish that the reasons for the RIF were pretextual. A.R. 13-23.

The full MSPB denied further administrative review of that decision. A.R. 9-12. Pursuant to 5 U.S.C. 7702(b), the EEOC reviewed the MSPB's decision and supporting records. It found that the TVA

had not discriminated against petitioner on the basis of her race or sex in connection with the RIF. A.R. 1-8.

3. On August 8, 1986, petitioner filed a complaint under 42 U.S.C. 2000e-16(c) in district court, alleging that her dismissal was intentionally motivated by sex and/or race discrimination. C.A. R.E. 6-21. 5 U.S.C. 7703(b)(2). At trial, petitioner offered no evidence indicating that Dr. Sample's decision to eliminate her position, or Shield's concurrence in Dr. Sample's decision, was in any way motivated by race or sex discrimination. Rather than focusing on the decisionmakers who were responsible for her RIF—and proof of whose illegal intent was critical to her case—petitioner focused on the actions of her previous supervisors, Dr. Hauck and Dr. Orvis Engelstad, neither of whom had played any role in the RIF. Tr. 132-133, 158; A.R. 193, 487.

The district court entered judgment in petitioner's favor. The court did not find that petitioner was the victim of intentional discrimination, nor did the court find, contrary to petitioner's assertion, Pet. 5-6, that the TVA's reason for dismissing petitioner was pretextual. Instead, citing *Johnson* v. *Transp. Agency*, 480 U.S. 616 (1987), the court held that the TVA had violated Title VII by not giving petitioner a layoff preference under the TVA affirmative action plan. The court said that "[t]he RIF decision may have had a rational basis," Pet. App. A7, but that petitioner was entitled to keep her position nonetheless, because "[o]nce the employer is *permitted* voluntarily to adopt an AAP 'to benefit members of the minority groups for whose protection the statute was enacted', the employer is then *required* to adhere to its own program. Otherwise, the adoption of an AAP would be meaningless." *Id.* at A10-A11. In the court's view,

the fact that the TVA had adopted an affirmative action program meant that petitioner was "entitled to reverse, reverse discrimination." *Id.* at A14. After ordering reinstatement and backpay, the district court reserved decision on attorney's fees and denied all other sought-after relief. App., *infra*, 1a-2a; C.A. R.E. 35-36.[5]

4. The court of appeals reversed and entered judgment for respondents. Pet. App. A19-A28. Although noting that "[t]he plan did not contain provisions governing procedures to be followed during any cutbacks in staff size," *id.* at A23, the court found it unnecessary to decide whether the AAP applied to the dismissal of a covered employee under a RIF since the court held that petitioner's claim lacked merit even if the AAP applied to such dismissals. *Id.* at A24-A28. In so ruling, the court held that the district court had misread *Johnson* v. *Transp. Agency, supra.* As the court of appeals explained, *Johnson* held that Title VII does not prohibit all forms of

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[5] Nearly six months after the appeal was filed, and after respondents had filed their brief as appellants in the court of appeals, petitioner filed a motion in the district court for a "clarification of findings of fact pursuant to Fed. R. App. P. 10(e)." This motion was mailed to respondents on the day it was filed with the district court, and no proceedings were undertaken in the court of appeals, or notice given to respondents, before it was filed. Two days later, before respondents had any opportunity to respond, the district court issued a purported supplemental opinion and order. As the court of appeals held, that purported action by the district court was outside the scope of Rule 10(e) and therefore of no legal effect. Pet. App. A27. Moreover, the court of appeals also held that, even if the district court's action were proper under Rule 10(e), "the crux of the later opinion was still the failure of the employer to follow the affirmative action plan." Pet. App. A27.

affirmative action, but did not hold that an employer's violation of a voluntary affirmative action program automatically violates Title VII. Pet. App. A24-A26.[6] After rejecting the sole ground for the district court's decision, the court of appeals held that respondents were entitled to judgment "as a matter of law," because "the evidence would not support a finding that [respondents] had otherwise violated" Title VII. Pet. App. A28.

ARGUMENT

1. Petitioner asks the Court to decide the question whether Section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c), grants a federal employee a cause of action against the government for its alleged failure to comply with an affirmative action plan. That claim does not warrant review by this Court, for several reasons.

a. To begin with, this case does not properly present that question, for two reasons. First, petitioner did not raise that claim at trial, and neither the district court nor the court of appeals passed on it. The courts below addressed the question whether an employer's violation of an affirmative action plan is a form of "discrimination" under

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[6] Contrary to petitioner's assertion, Pet. 10, the court of appeals did not hold that an agency's violation of an affirmative action plan is irrelevant to the question whether the agency has discriminated. The court of appeals simply held that a violation of an affirmative action plan *"alone* is not enough to trigger a Title VII violation." Pet. App. A24 (emphasis added). In fact, the Eleventh Circuit in *Ferguson* v. *Veterans Admin.*, 723 F.2d 871, 873, cert. denied, 469 U.S. 1072 (1984), left open the possibility that a violation of a plan could serve as evidence of discrimination prohibited by Title VII.

Title VII. For the reasons explained below, the court of appeals correctly ruled that an employer's failure to follow a voluntary affirmative action plan is not itself a form of discrimination. and that decision does not warrant further review. The question presented by petitioner is different; she claims that Section 717(c) grants a federal employee the right to enforce the federal government's compliance with a voluntary affirmative action plan, regardless of whether the government's failure to do so is a form of "discrimination." Although there is no merit to that claim, it is also true that petitioner has not preserved it in this case.

Second, the gravamen of petitioner's claim is that the TVA violated its affirmative action plan by denying her a layoff preference during the RIF. That claim, however, is not supported by the record. Neither the terms of the affirmative action plan quoted by the district court, Pet. App. A2-A6, nor any other term of that plan indicates that it applies in the case of a RIF. The plan mentions only hiring and promotions and is altogether silent on the subject of layoffs. The court of appeals therefore correctly noted that "[t]he plan did not contain provisions governing procedures to be followed during any cutbacks in staff size." *Id.* at A23. Moreover, although the plan contains a statement of numerical goals for hiring women and minorities in certain targeted positions, the plan does not state that the goals are mandatory. In sum, there is no foundation to petitioner's claim that the TVA violated its affirmative action plan.

Relying on excerpts from the district court's decision, petitioner contends that the district court found that the TVA had violated its affirmative ac-

tion plan and that the district court's findings are not clearly erroneous. Pet. 12-13. Petitioner, however, has misread the district court's decision. The district court did not find that the TVA violated any specific provision of its affirmative action plan by discharging petitioner. Instead, the district court concluded that the TVA had violated its plan by not granting petitioner a layoff preference, because that court believed that every such plan must contain an implied layoff preference for minorities and women. "Otherwise," the court wrote, an affirmative action plan would be "meaningless." Pet. App. A11.

There is no legal (or logical) basis for such an implied obligation, and *Johnson* v. *Transp. Agency, supra*, the only authority on which the district court relied, did not create one. As the court of appeals correctly recognized, *Johnson* held only that Title VII does not prohibit all forms of affirmative action. *Johnson* did not hold that Title VII requires any such program. In fact, the text of the Act and this Court's decisions make it clear that Title VII imposes no such obligation on an employer. See 42 U.S.C. 2000e-2(j) ("Nothing contained in [Title VII] shall be interpreted to require any employer * * * to grant preferential treatment to any individual * * *."); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) ("The statute was not intended to 'diminish traditional management prerogatives.' It does not require the employer to restructure his employment practices to maximize the number of minorities and women hired.") (citation omitted).[7] The court of appeals thus correctly held that

[7] Moreover, construing the TVA plan to require the layoff preference invented by the district court would raise serious questions regarding the lawfulness of the plan under Title VII

the district court misread Title VII, and its decision is consistent with that of every other court of appeals that has addressed this issue. See *Washington* v. *Electrical Joint Apprenticeship & Training Comm.*, 845 F.2d 710, 713 (7th Cir.), cert. denied, 109 S. Ct. 371 (1988); *Manoharan* v. *Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 594 (2d Cir. 1988); *Yatvin* v. *Madison Metro. School Dist.*, 840 F.2d 412, 415-416 (7th Cir. 1988); *Gilchrist* v. *Bolger*, 733 F.2d 1551, 1554 n.1 (11th Cir. 1984); *Ferguson* v. *Veterans Admin.*, 723 F.2d 871, 872 (11th Cir.), cert. denied, 469 U.S. 1072 (1984); *Page* v. *Bolger*, 645 F.2d 227, 233-234 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981); see *Williams* v. *City of Sioux Falls*, 846 F.2d 509, 5012 (8th Cir. 1988) (violation of minority business enterprise affirmative action guidelines is not itself discrimination). Petitioner has cited no decision to the contrary.[8]

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and the Due Process Clause. See, *e.g.*, *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984).

[8] Other than the district court decision in this case, the only other reported decision to the contrary is a district court decision that relied on the district court's decision in this case. *Morman* v. *John Hancock Mut. Life Ins. Co.*, 672 F. Supp. 993 (E.D. Mich. 1987).

Petitioner relies on the Eleventh Circuit's earlier decision in *Eatmon* v. *Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503 (1985), Pet. 14-15, but that case is inapposite. *Eatmon* held that a district court has jurisdiction under Section 706(f)(3) of Title VII, 42 U.S.C. 2000e-5(f)(3), over an action against a private party to enforce a conciliation agreement, because such an action is one "brought under" Title VII. 769 F.2d at 1508-1513. *Eatmon* further held that a district court has jurisdiction under 28 U.S.C. 1331 over an action brought by an intended third-party beneficiary of a conciliation agreement to

b. There is also no merit to the claim that petitioner presents for review. Relying on the reference in Section 717(c) to Exec. Order No. 11,478, 3 C.F.R. 446 (1970), petitioner claims that Title VII grants federal employees a remedy for an agency's failure to comply with the affirmative action obligations imposed on the agency by the executive order. That argument is twice wrong.

First, Section 717(c) gives a federal employee the right to file a civil action "on a complaint of *discrimination* based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section [42 U.S.C. 2000e-16(a)], Executive Order 11478 or any succeeding Executive orders" (emphasis added). Thus, Section 717(c) grants federal employees a remedy only in cases of "discrimination," and as explained above, the government's failure to follow an affirmative action program is not itself discrimination. *Manoharan*, 842 F.2d at 594 ("Since section 704(j) of Title VII states that affirmative action in employment practices is not required by Title VII, * * * an employer's failure to follow its own voluntary affirmative action program

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enforce its terms. *Id.* at 1513-1517. *Eatmon* does not assist petitioner, because the TVA did not enter into a conciliation agreement in order to settle a lawsuit. Instead, the TVA voluntarily adopted an affirmative action plan, which does not require an employee to relinquish any potential claims that the employee may have against an employer. In fact, *Eatmon* made clear that a person, like petitioner, who has not signed a release as part of a concilation agreement *cannot* bring an action under Title VII. *Id.* at 1514. Petitioner therefore could not invoke *Eatmon* to sustain her claim. In any event, an alleged intracircuit conflict is for the Eleventh Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

cannot, by itself, constitute an unlawful employment practice within the language of section 703(a)(1)."); *Yatvin*, 850 F.2d at 415 ("[T]he breach of a promise to give women favored treatment is not sex discrimination. Sex discrimination is treating a person worse because of her (or his) sex; it is not refusing to discriminate in favor of a person on grounds of her sex."). The reference in Section 717(c) to Exec. Order No. 11,478 was designed to ensure that federal employees could obtain judicial relief for claims of discrimination that had previously been resolved in the administrative process before Congress made the federal government subject to Title VII in 1972. See *Koger* v. *Ball*, 497 F.2d 702 (4th Cir. 1974).[9] Section

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[9] Before 1972, Title VII of the Civil Rights Act did not apply to the federal government. In 1969, President Nixon promulgated Exec. Order No. 11,478, 3 C.F.R. 446 (1970), which stated that "[i]t has long been the policy of the United States Government to provide equal employment opportunity in Federal employment on the basis of merit and fitness and without discrimination because of race, color, religion, sex, or national origin." Section 2 of the order directed federal agencies to adopt an "affirmative program of equal employment opportunity * * *." Section 4 required the former Civil Service Commission to establish grievance procedures to handle complaints of discrimination filed by federal employees. Complainants, however, were unable to seek further relief in the courts. See, *e.g.*, *Gnotta* v. *United States*, 415 F.2d 1271, 1278 (8th Cir. 1969) (Blackmun, J.), cert. denied, 897 U.S. 934 (1970). In 1972, Congress enacted the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. 2000e *et seq.*), to provide a remedy for employment discrimination in the federal government. Section 2000e-16 is the centerpiece of that effort. Subsection (a) prohibits employment discrimination. Subsection (b) gives the EEOC authority to adopt administrative procedures to ensure that personnel decisions are free from discrimination. And subsection (c) gives federal employees a right of action

717(c) does not also give federal employees a remedy if the government does not follow an affirmative action plan.[10]

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to sue on a complaint of discrimination once those administrative remedies are exhausted.

The reference in 42 U.S.C. 2000e-16(c) to Exec. Order No. 11,478 must be viewed in light of the purpose of that Section to make claims of discrimination actionable in court—*i.e.*, claims that had been previously resolved administratively under Section 4 of Exec. Order No. 11,478. By specifically incorporating and referring to Executive Order 11478, Congress provided a judicial remedy for administrative cases pending when Section 2000e-16(c) was enacted. See *Koger* v. *Ball, supra.* No reference to the affirmative action provision of Exec. Order No. 11,478 appears in either the Act or its legislative history.

Petitioner misapprehends the significance of the reference to Exec. Order No. 11,478. Congress, of course, was referring to the Order as it existed in 1972, which created an administrative remedy for complaints of discrimination. The 1978 version no longer contains Section 4 as described above, nor does it contain any language regarding an employee's right to file a complaint of discrimination. After the enactment of Section 2000e-16, which created an administrative and judicial enforcement scheme of its own, the complaint procedure of Exec. Order No. 11,478 became obsolete, and it was dropped when the Order was revised in 1978.

[10] As the Eleventh Circuit explained in *Ferguson*, 723 F.2d at 872:

> Title VII addresses *discrimination.* Plaintiff contends that her employer's failure to implement its own affirmative action plan, designed for the benefit of women and minorities, translates into a Title VII cause of action by which she is entitled to relief. We hold, however, that absent a showing of discrimination, there is no Title VII cause of action for the failure to implement or utilize an affirmative action program. Without repeating here the analysis there made, we simply adopt as the law of this

Second, Exec. Order No. 11,478 does not require agencies to adopt affirmative action plans that grant federal employees layoff preferences, and the TVA plan contains no such preference. In sum, the reference in Section 717(c) to Exec. Order No. 11,478 does not grant federal employees (or petitioner) any greater rights than Section 717(a).[11]

2. Petitioner also challenges the court of appeals' decision to enter judgment in respondents' favor, instead of remanding the case to the district court for further proceedings. That fact-bound claim does not warrant further review.

This Court held in *Pullman-Standard* v. *Swint*, 456 U.S. 273, 292 (1982), that when a district court has rendered an erroneous factual finding due to its mistaken view of the law, the proper course for an appellate court is to remand the case to the district court for it to apply the correct law to the facts in

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Circuit the reasoning and conclusion of the Fourth Circuit in *Page* v. *Bolger*, 645 F.2d [at 233-234]:

> [It is argued that] a proven violation of the Postal Service's statutorily mandated "affirmative program," designed to eradicate discrimination, would be made a violation of Title VII itself. Affirmative action undertakings by government employers would come in practical terms to define the standards for compliance with Title VII's antidiscrimination provisions. We do not think this could accord with Congressional intent.

[11] Indeed, allowing an employee to sue his employer for violation of an affirmative action plan would discourage employers from adopting such a plan in the first place. *Yatvin*, 840 F.2d at 416. Neither private nor federal employers are eager to be "hoist[ed] on [their] own petard[s]," in the words of the district court. Pet. App. A14. Petitioner's interpretation of Title VII would therefore discourage voluntary efforts to achieve equal employment opportunity.

the first instance "unless the record permits only one resolution of the factual issue." In this case, the court of appeals complied with *Swint* by determining that the "evidence would not support a finding that the [respondents] had otherwise violated the provisions of Title VII," Pet. App. A28, and its conclusion is correct. Under *Burdine* and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), petitioner had the burden at trial to show that the TVA's reasons for her dismissal were pretextual and that she was dismissed pursuant to the RIF for discriminatory reasons. Since Dr. Sample and Mr. Shields were the two persons responsible for the decision to dismiss petitioner pursuant to the RIF, A.R. 537; Tr. 75-78, 213-217, petitioner had to prove that they acted out of illegal bias. See *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983); *Swint*, 456 U.S. at 290. Petitioner did not introduce any evidence suggesting, much less proving, that either one had an improper motive. Instead, she focused her proof on matters that neither one had anything to do with. Tr. 93, 95, 207-209.[12]

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[12] Petitioner argues at length about various pretermination claims of discrimination, and asserts that she was "denied her day in court on these other claims" when the court of appeals entered judgment for respondents. Pet. 7. Given petitioner's reliance on the district court's December 16, 1987, supplemental opinion, that claim is surprising, since the district court in that opinion specifically stated that it "intended not to grant [petitioner] any relief for any alleged pre-termination discrimination. The court found pre-termination *smoke* but no pre-termination *fire*." Pet. App. A17. Moreover, the district court's judgment from which respondents appealed specifically denied petitioner *all relief* other than with respect to her claim that the TVA had violated its affirmative action plan. App., *infra*, 1a-2a. Petitioner therefore had an opportunity to prove her claims.

Under these circumstances, petitioner did not prove an essential element of her claim, and the court of appeals properly entered judgment in respondents' favor. See, *e.g.*, *Pollard* v. *Rea Magnet Wire Co.*, 824 F.2d 557, 559-561 (7th Cir.), cert. denied, 484 U.S. 977 (1987); *King* v. *Trans World Airlines, Inc.*, 738 F.2d 255, 259 (8th Cir. 1984); *Sisco* v. *J.S. Alberici Constr. Co.*, 655 F.2d 146, 149 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S. CHRISTENBURY
General Counsel
Tennessee Valley Authority

JAMES E. FOX
Deputy General Counsel

JUSTIN M. SCHWAMM, SR.
Assistant General Counsel

THOMAS F. FINE
Senior Litigation Attorney

JOHN P. KERNODLE
Attorney
Tennessee Valley Authority

MARCH 1990

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

CIVIL ACTION NO. 86-AR-5428-NW

CHRISTINA FANG-HUI LIAO, *Plaintiff*

vs.

CHARLES H. DEAN, JR., ET AL., *Defendants*

[Entered May 6, 1987]

ORDER

In accordance with the accompanying memorandum opinion, it is ORDERED, ADJUDGED, and DECREED by the court as follows:

1. Plaintiff, Christina Fang-Hui Liao, shall have and recover of defendants, Charles H. Dean, Jr., and John B. Waters, the sum of $180,506.00, representing back pay accruing to this date from the date of her termination. January 8, 1982, at her annual salary rate of $33,845.00 without interest. Defendants are authorized and directed to make income tax withholding and other appropriate deductions. The sum, as thus reduced, together with a written explanation of the deductions, shall be delivered to counsel for plaintiff within 30 days, after which he shall satisfy on the judgment on the records of this court.

2. Defendants shall forthwith reinstate Dr. Liao to a position at Tennessee Valley Authority as SD-4

or in a job classification with an equivalent or better salary range and job responsibility.

3. The court finds no necessity to enjoin defendants from future racially or sexually discriminatory action, vis-a-vis Dr. Liao, and will assume that defendants will in the future comply with Title VII and the TVA affirmative action plan.

4. All requests for relief not hereinabove granted (except plaintiff's attorney's fees, which are reserved for decision pursuant to Local Rule 11), are DENIED.

5. Costs are taxed against defendants.

DONE this 6th day of May, 1987.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

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